No. 3810

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM P. HOPKINS and I. A. SHAFFER, JR., as Trustees of the Estate of A. C. HOPKINS, Deceased

Appellants

v.

EARL C. BRONAUGH, as Trustee in Bankruptcy of the Estate of MORRIS BROTHERS, INC., Bankrupt

Appellee

Brief of Appellee

Upon Appeal from the United States District Court for the District of Oregon

---

CAREY & KERR and CHARLES A. HART
Attorneys for Appellants

JOHN P. WINTER
Attorney for Appellee

LIST OF CASES CITED

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM P. HOPKINS and I. A. SHAFFER, JR., as Trustees of the Estate of A. C. HOPKINS, Deceased

Appellants

v.

EARL C. BRONAUGH, as Trustee in Bankruptcy of the Estate of MORRIS BROTHERS, INC., Bankrupt

Appellee

Brief of Appellee

Upon Appeal from the United States District Court for the District of Oregon

---

STATEMENT OF THE CASE

This proceeding was instituted to reclaim $50,000 worth of bonds from the Trustee of the bankrupt.

On December 27th, 1920, Morris Brothers, Inc., were adjudicated a bankrupt. The Company's assets amounted to about $1,200,000. Its liabilities aggregated over $2,000,000. The total claims of general

unsecured creditors exceed $1,800,000. Nearly all of these claims represent cash paid to the bankrupt for bonds that were to be delivered according to the terms of certain certificates issued by the corporation commonly known as interim certificates. In substance these certificates provide that Morris Brothers, Inc., will deliver bonds of a certain kind with coupons attached from a certain date "if when and as said bonds are issued and delivered" to the corporation, and in the event that the bonds would not be issued and delivered the corporation will redeem the certificate by repaying the purchase price with certain interest.

On December 9th, 1920, Mr. William P. Hopkins, a co-trustee of the Estate of A. C. Hopkins, deceased, orally placed an order for the purchase of $60,000 worth of bonds with Morris Brothers, Inc. The order was tentative only and was subject to the approval of I. A. Shaffer, the other trustee, who resides at Lock Haven, Pa.

On the following day, December 10th, 1920, Morris Brothers, Inc., wrote a letter to Mr. Shaffer at Lock Haven, Pa., as follows:

> "Mr. Wm. P. Hopkins was in yesterday and subject to your acquiescence on the purchase of said bonds placed with us an order for the following:" (Here follows a description of bonds of various municipalities, giving the amounts, the rate of interest, date of maturity and price, but not specifying any specific bonds.) The letter then states: "The bonds above mentioned are to be delivered to you about December 23rd or 24th,

and we are to send the same via registered mail insured, addressed to the Estate of A. C. Hopkins at Lock Haven, Pa." (Record pp. 129 and 130.)

On December 15th, 1920, Mr. Shaffer acknowledged receipt of the above letter, approved the purchase and directed as follows:

"You may therefore ship the bonds described in your letter to us, payment for which will be arranged by Mr. Hopkins." (Record p. 132.)

On December 20th, 1920, Mr. William P. Hopkins wrote a letter to Morris Brothers, Inc., at Portland, enclosing check as Trustee of the A. C. Hopkins, Estate for $61,000 "to apply on a purchase of municipal bonds made from you on December 9th." This letter further states as follows:

"Upon receipt of this check, please send me an exact statement of our account and if there is any considerable balance due you I will send you another check. If there is no considerable balance I will ask you to send the securities on to Mr. Shaffer at Lock Haven and let him remit any small balance direct." (Record p. 132.)

This letter was received about December 22nd, 1920, and on this date a letter was written by Morris Brothers, Inc., to William P. Hopkins acknowledging receipt of the check for $61,000 and enclosing an itemized statement covering the purchase. On account of the bankruptcy the letter was not mailed. This letter contains this statement:

"If you find the same in due order kindly

advise us and we will make prompt shipment to Mr. Shaffer at Lock Haven, Pa." (See record p. 136.)

The record discloses that at the time that the order for the bonds was placed Morris Brothers, Inc., had in stock and available for delivery, answering the description contained in the order, bonds amounting to about $20,000. The corporation had other bonds, but they were hypothecated with various banks and $10,000 of the bonds covered by the order were not owned by the corporation at the time the order was placed and were never acquired by it. These were the Port of Bay City Bonds. After the receipt of the order and confirmation thereof, the bankrupt began to assemble the bonds to fill the order and by the 24th of December $50,000 worth of bonds answering the description contained in the letter of December 10th had been assembled and placed in an envelope with the name "Hopkins' Estate" written across it, preparatory to delivering the same to the purchaser at Lock Haven, Pa. It was the intention of the bankrupt not to deliver the bonds until it had secured the Port of Bay City Bonds amounting to $10,000. This was the condition of affairs when the corporation was adjudicated a bankrupt.

This cause came on for hearing on April 1st, 1921, at which time evidence was offered by the claimant and the trustee and the cause was submitted. On April 18th by agreement of counsel further testimony was offered on behalf of claimant. The matter was then submitted to the Referee on briefs, and the Referee decided the cause in favor of the Trustee. Upon re-

view the decision of the Referee was sustained by the District Court and thereafter Counsel for claimant filed a petition to re-open the proceedings and to take further testimony. This petition was granted and the cause was again referred to the Referee. Additional testimony was offered by claimant, mainly upon the point of delivery. The cause was again argued before the Referee, who upon the second hearing sustained his former ruling and denied the petition. Upon review to the District Court this decision of the Referee was again upheld.

ARGUMENT

The question involved in this appeal is: Did the title to that part of the bonds covered by the order which had been assembled pass to claimant? No claim is made that the Hopkins Estate is entitled to recover all of the bonds embraced in the purchase agreement. The order covers $10,000 Port of Bay City Bonds. The bankrupt never acquired any part of Bay City Bonds and therefore, of course, could not transfer title to any part of the Bay City Bonds to claimant.

The question as to whether or not title passes is primarily one of the intentions of the parties to be derived from the terms of the agreement itself and the circumstances surrounding the transaction.

24 R. C. L. 15 Section 275,

U. S. vs. Woodruff, 22 Wallace 180,

22 L. Ed. 863, 868,

Barber vs Andrews (29 R. I. 51), 26 L. R. A. (N. S.) p. 1 to 7, note 4.

What was the intention of the parties to this proposed sale? The terms of the agreement do not specifically provide for the passing of title. As to whether or not title actually passed must therefore be determined from the conditions and circumstances surrounding the transaction. The case was twice heard by the Referee and was twice considered by the District Court. Both the Referee and Court after considering all of the testimony and circumstances surrounding the entire transaction determined as a fact that it was not the intention to pass title until all of the bonds embraced in the order were available for delivery and delivery was made. Counsel for appellants argues that the Referee and Court both erred in not finding as an affirmative fact that the title to those bonds which had been segregated passed to the buyer. His contention is that the terms of the agreement and the surrounding circumstances proved that it was the intention to pass the title to the bonds which were available for delivery. This contention is based upon the familiar principle—that

1. Where a sale is absolute in terms, and
2. Where the property sold has been identified, and
3. Where the purchase price is paid the title to the property passes in the buyer and this regardless of any obligation on the part of the seller to make delivery of the property to the buyer.

The above principle of law is generally applied by the Court in the case of a sale of specific property.

This rule itself does not change the primary principle that the question is one of the intention of the parties. The rule has not the same application in cases where the contract of sale deals not with certain specified property but with property of a certain kind only.

It must be remembered at the outset that the agreement as shown by all of the testimony was only an executory agreement to sell not specific bonds but **bonds of a certain kind.** As is stated by Judge Bean in his opinion on review (Record p. 33).

> "It is to be observed the contract was not for the sale and purchase of certain specific bonds, but only of bonds of certain issues, denomination, maturity and rate of interest. The delivery by the seller of any bonds whether then owned or afterward acquired, answering this general description would have been a compliance with the contract. The selection by the seller of the particular bonds which it intended to deliver under the contract was not irrevocable. Notwithstanding such selection, it could thereafter have substituted others of like kind. All the buyers could demand was that when the time for performance arrived, bonds of the description and kind specified in the contract be delivered."

In the case of

> H. Baars & Co. vs Mitchell, 154 Fed. 322-323-325.

cited by appellant the Court had before it a contract

of sale covering specified property described in the contract. The contract stated:

> "Confirming verbal understanding with you I confirm sale to you of all lumber of the following description now on hand at the mill of R. R. Cowan, Cowan, Fla., and all that he will manufacture during the next six months from this date, and at the prices named. (Setting forth the prices.")

In reviewing the decision of the lower Court the Court after quoting from Hatch vs. Oil Co., said, "In the light of this high authority, it seems that in the present case all the requisites to a binding sale were complied with. There was an undisputed agreement for one party to sell and another to buy. The thing was specially designated, described and segregated. The price was fixed and payments were made as agreed." The Court further stated:

> "Although the agreement may have been to some extent executory, it being for the purchase and sale of all lumber of a certain description 'now on hand at the mill of R. R. Cowan, Cowan, Fla., and all that he will manufacture,' during a specified period, yet when the lumber was manufactured and segregated and the **bills of sale with full detail and description were presented and accepted and payment made according to** the contract there was a complete sale of the property designated in the bills and the title thereto at once vested in Baars & Company."

In the Baars case the particular lumber was not only

specified in the agreement, but it was manufactured and segregated and thereafter bills of sale "with full details of description were presented and accepted" and payment made according thereto. From these facts and circumstances the Court found that it was the intention under the agreement that the title to the lumber should pass to the purchaser after it was manufactured, segregated and accepted and the bills of sale were rendered and the purchase price paid. The facts in that case, as we shall point out later, differ materially from the facts in the case at bar. No sale of specific property was contemplated by the agreement in the Hopkins case. The bonds were not segregated with the purpose of passing title. The purchase price was not paid with any understanding or knowledge that the bonds had been segregated.

The case of McElwee vs. Metropolitan Lumber Company, 69 Fed. 302-305, was one involving a contract for the sale of all of the lumber to be manufactured by the defendant Company during a given period. When the product of a particular month was completed it was inspected, measured and accepted and plaintiff made its notes in payment thereof. The Court said:

> "To say title remained with the vendor after the lumber had been appropriated to the contract and accepted by the buyer, and after the negotiable notes of the vendee had been delivered in settlement, would leave the vendor liable for loss by fire or other casualty, and the vendee without security for the payment he had made."

It will be noted that in this particular case the lum-

ber was not only segregated or appropriated for the purchaser, but this was done with his assent as the lumber was accepted by the buyer. In the present case certain bonds were assembled for future delivery, but this was not done with the express or implied assent of the buyer and it was not done for the purpose of passing title to the buyer. The Court will note that all of the decisions referred to by counsel are either cases where the contract of sale referred to specific property, or where the property was afterwards identified and set aside with the assent of the buyer.

Each case must be governed by its own facts and the circumstances surrounding the same. It is always a question of what was the intent of the parties.

In 1919 Oregon adopted the Uniform Sales Act. This act provides as follows:

"1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such times as **the parties to the contract intend it to be transferred.**"

"2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the trade." (See Section 8181 Olson's Code.)

Then the act lays down certain rules for ascertaining the intention of the parties, it says:

Unless a different intention appears the following

are rules as to the time at which the property in the goods is to pass to the buyer:

Rule 1 is as follows:

"Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."

Rule 2 is:

"Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done."

Rule 4 is:

"(1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

"(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appro-

priated the goods to the contract, except in the cases provided for in the next rule and in Section 8183. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents."

Rule 5 is:

"If the contract to sell requires the seller to deliver the goods to the buyer or at a particular place or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

Rule 3 is omitted because its terms clearly have no application to the present case.

It is respectfully submitted that the present case is controlled by Rule 5, because the terms of the contract require Morris Brothers Inc., as a seller to deliver the bonds to the buyer and Morris Brothers, Inc., agreed to pay the costs of transportation. After Mr. William P. Hopkins had orally given a tentative order for the $60,000. worth of bonds and on December 10th Morris Brothers, Inc., wrote to Mr. Shaffer, the other trustee of the Hopkins Estate at Lock Haven, Pa., as follows:

> "Mr. William P. Hopkins was in yesterday and subject to your acquiescence on the purchase of said bonds placed with us an order for the following:"

then follows a description of a certain kind of bonds, not of specific bonds. Then the letter states:

> "The above mentioned bonds are to be delivered to you about December 23rd or 24th, and we are to send the same via registered mail insured, addressed to the Estate of A. C. Hopkins, Lock Haven, Pa." (See Record pp. 129 and 130).

This letter was answered by Shaffer in behalf of the Hopkins Estate. (See Record p. 132). Mr. Shaffer's letter approved the purchase and directed—

> "You may therefore ship the bonds described in your letter to us, payment for which will be arranged by Mr. Hopkins."

Mrs. Gramming, a witness called by claimant, testified as follows:

> Q. (By MR. HART): You were acting in what capacity with Morris Brothers, Inc., prior to the closing of the doors, in December, 1920?
>
> A. I looked after the shipping out of securities and wrote letters regarding sales and different transactions connected with the sending out of bonds and securities. (See Record p. 108)

On cross examination this witness testified:

> Q. Did you look after the insurance?
>
> A. No, our office boy looked after that. I checked it up and signed the letters.
>
> Q. If these bonds had been shipped you would have sent them by registered mail?

A. Yes.

Q. Insured?

A. Yes.

Q. With loss, if any, payable to whom?

A. To Morris Brothers because we were responsible for the bonds until they arrived at their destination.

Q. Did you pay the insurance charges?

A. It was charged to us. (See Record p. 113.)

This testimony of Mrs. Granning, who looked after the shipping out of securities and wrote letters regarding sales, etc., clearly indicates that Morris Brothers, Inc., had an understanding that under the agreement with the Hopkins Estate it was directed to ship the bonds to Lock Haven, Pa., was responsible for the arrival of the bonds at that place and it is likewise evident that the Trustees of the Hopkins Estate also had the same understanding, towit: That Morris Brothers, Inc., were to deliver the bonds to them at Lock Haven. It is inconceivable that Mr. Shaffer and Mr. Hopkins, men of affairs, who have charge of a large estate, would have purchased from Morris Brothers, Inc., securities worth $60,000. with the understanding that the title to these securities was to pass to the Hopkins Estate in Portland, without having made arrangements for the protection of the Estate, while the bonds were in transportation. Who would have suffered if the bonds had been mailed to the Hopkins Estate and the mails had

been robbed in transit? They were to be insured as the property of Morris Brothers, Inc., while in transit and not as the property of the Hopkins Estate. Could it have been claimed by Morris Brothers, Inc., that the loss fell on the estate? Could it have been contended by the Insurance Company that at the time the insurance was taken Morris Brothers, Inc., had no title to the property insured and therefore the Insurance Company was not liable?

The District Court granted a re-hearing for the purpose of giving claimant an opportunity to offer additional testimony upon the point of delivery, and the testimony of Mr. William P. Hopkins and Mr. Glenn was offered (See Record p. 141)

Mr. Hopkins testified as follows:

> Q. Now, Mr. Hopkins, what, if anything, was said at this time by you and Mr. Glenn or in conersation with Mr. Glenn as to the time or manner of payment and the time or place of delivery of the bonds?

(Referring to the conversation between Mr. Glenn and Mr. Hopkins, which occurrred on the 9th of December.)

(This question was objected to for the reason that it came within the condemnation of the statute of frauds and could not be received to vary the terms of the letters.)

> A. I said to Mr. Glenn that we would have some funds in about the 23rd or 24th of December

with which to take up those bonds, and Mr. Glenn said, "Do you want the bonds sent to Lock Haven with sight draft attached?" and I said, "No, I don't. I want to send the money here and take the bonds up here" and he said, "All right."(See Record p. 142)

On cross examination the witness was asked—

Q. Do you remember when you had the conversation with Mr. Glenn, saying that these bonds should be sent to Lock Haven the same as the other bonds?

A. I do not remember saying that.

Q. Do you say that you did not say that?

A. I do not remember whether anything was said about it or not.

Q. Upon that point you have no recollection one way or the other?

A. No.

Q. And if Mr. Glenn should testify that you had that conversation, so far as your memory goes that might be right?

A. If he should testify positively that he remembers I said that I would think there would be no doubt about it.

Q. And when you said you would send the money and take the bonds up here, you meant that they were to be shipped to Lock Haven?

A. No, I did not. I meant that we would take them up here; that they would be paid for here.

(See Record p. 148)

Q. Did you tell Mr. Glenn that you would send the money here and take up the bonds here?

A. Yes.

Q. Just what did you mean by that?

A. Just that; that I would send the money and take the bonds here, in Portland.

Q. And you were not coming here yourself to take them?

A. No.

Q. How were you to take them here?

A. I was to send the money here for the bonds and they were to send them to Mr. Shaffer. (See Record p. 146).

Mr. Glenn who was in the employ of Morris Brothers, Inc., and with whom Mr. Hopkins had the negotiations for the purchase of these bonds testified as follows:

Q. On the second sheet of Claimant's Exhibit 6 you have a memorandum to this effect: 'Ship bonds to Estate of A. C. Hopkins, Lock Haven, Pa.' Is that right?

A. Yes.

Q. And you made this memorandum just as you were talking with Mr. Hopkins?

A. Yes. (See Record p. 165).

Even if we give due weight to the oral testimony offered by claimant touching the question of whether or not the bonds were to be delivered at Lock Haven, the inevitable conclusion must be that the agreement and understanding was that the bonds were to be delivered by Morris Brothers, Inc., to the Hopkins Estate at Lock Haven, Pa.

It must be remembered that Mr. Hopkin's testimony in regard to the delivery of the bonds was given at the re-hearing and after the court had decided that under the agreement as it existed Morris Brothers, Inc., were to deliver the bonds to the Hopkins Estate and that no title passed until delivery was made.

At the trial of this cause counsel for claimant in oral argument and by written brief vigorously contended that the transaction involved was the sale of specific property and that for this reason title passed and cited numerous authorities involving the sale of specific property. His contention was that Rule 1 of the Uniform Sales Act, above quoted, controlled the case. But the contract here is not for the sale of specific goods; it is for the sale of bonds of a certain kind and therefore it is submitted that Rule 1 has no application and that the cases involving the sale of specific property likewise have no application, and it is further submitted that Rule 5 of the Uniform Sales Act governs.

The agreement is evidenced by the letter of December 10th written by Morris Brothers, Inc., to Mr. Shaf-

fer Trustee of the Hopkins Estate and by the reply to this letter written on December 15th. The oral conversation had by Mr. Hopkins and Mr. Glenn on the 9th day of December did not amount to a binding agreement. The understanding was that this oral agreement was tentative, was subject to the approval of the co-trustee. The letter of the 10th written by Morris Brothers, Inc., to the Hopkins Estate "Claimant's Exhibit 1" clearly sets forth the kind of bonds Morris Brothers, Inc., were to sell to the Hopkins Estate, the price thereof and that they were to be delivered at Lock Haven. The offer contained in this letter was accepted by letter signed by Mr. Shaffer, "Claimant's Exhibit 2". Mr. Hopkins in his testimony states that Mr. Shaffer had authority to accept the offer. If the two letters, Claimant's Exhibit 1 and 2 do not constitute a binding agreement to purchase, then no agreement existed between the parties for the purchase of any bonds, for the oral understanding under the statute of frauds could not be enforced.

The two letters show a complete agreement. Every element of an agreement is specifically set forth, in Claimant's Exhibit 1, being the offer and in Claimant's Exhibit 2, being the acceptance. Everything was settled by these two letters, excepting alone the time of payment. The payment was left to Mr. Hopkins the co-trusteee. All of the terms are not only incorporated but clearly expressed in these two letters.

The general rule in regard to the admission of parol evidence is ably discussed by Willison on Contracts. The noted author says, Vol. II, Section 633:

"The parol evidence rule does not apply to every contract of which there is written evidence, but 'only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement.' * * * Since it is only the intention of the parties to adopt a writing as a memorial which makes that writing an integration of the contract, and makes the parol evidence rule applicable, any expression of their intention in the writing in regard to the matter will be given effect. If they provide in terms that the writing shall be a complete integration of their agreement or that it shall be but a partial integration, or no integration at all, the expressed intention will be effectuated. The parties, however, rarely express their intention upon this point in the writing, and if the court may seek this intention from **extrinsic circumstances, the very fact that parties made a contemporaneous** oral agreement will of itself prove that they did not intend the writing to be a complete memorial. The only question open would be whether such a contemporaneous oral agreement was in fact made. Even if the oral agreement is repugnant to the writing, what was orally agreed would be of equal importance with what was written, since its existence would prove that there was no complete integration of the contract in regard to the matter to which it related. The parol evidence rule would then be of importance only as establishing a presumption that prior and contemporaneous oral agreements and negotiations were merged in the writing. But the practical value of the rule would be much impaired if either party

to the writing were allowed to rebut the presumption by proof of any contemporaneous oral agreement. Certainly the law does not permit this. The question arises chiefly where it is asserted not that there is no integration at all, but only a partial integration. It is generally held that the contract must apear on its face to be incomplete in order to permit parol evidence of additional terms. Frequently, it is not necessary inference from the writing itself either that it is a statement of the whole agreement, or that it is not. In such a case it has been held that parol evidence is admissible to show which is the fact. The difficulty with such a principle lies in its application. No written contract which does not in terms state that it contains the whole agreement (and few do so provide though it would be generally a wise provision) precludes the possible supposition of additional parol clauses, not inconsistent with the writing. The matter has been well summed up by Finch, J.: 'If we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself. The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. If upon the inspection and study of the writing, read, it may be, in the light of surrounding circumstances in order to its proper understand-

ing and interpretation it appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract.' ''

Claimant's Exhibit 1 and 2 evidences a complete contract; contains a complete description of the various kinds of bonds; the net price to be paid therefor; the time and place of delivery, therefore this contract could not be changed or modified by what was said between Mr. Hopkins and Mr. Glenn on the 9th of December and before the letters were written.

But even if the court should take into consideration all of the testimony in regard to the entire transaction the weight of testimony clearly shows that it was the understanding that these bonds were to be delivered by Morris Brothers, Inc., at the risk of Morris Brothers, Inc. to the buyer at Lock Haven, Pa. The transaction was so understood by Morris Brothers, Inc., and was likewise so understood by the trustees of the Hopkins Estate. Morris Brothers assumed the risk of delivering the bonds to Lock Haven. They intended to insure the bonds for the benefit of Morris Brothers and not for the benefit of the buyer.

They did not intend to ship any of the bonds until they had received all of them. On December 22nd. 1920, Morris Brothers, Inc., wrote a letter to Mr. Hopkins at Spokane acknowledging receipt of his letter of December 20th with enclosed check for $61,000. An itemized statement covering the bonds purchased had been pre-

pared to be sent to Mr. Hopkins with the letter written on December 22nd. The letter stated

> "If you find in due order, kindly advise us and we will make prompt shipment to Mr. Shaffer, at Lock Haven, Pa." (See Record, p 136.)

The enclosure referred to consisted of an itemized statement of the bonds purchased and it covered all of the bonds, not only the $50,000 bonds which had been assembled, but also a description of the $10,000 of Port of Bay City bonds which had never been received by Morris Brothers, Inc. (See Trustee's Exhibit A, Record p. 137). According to the itemized statement the total amount of the purchase price of the bonds including accrued interest on the coupons amounted to $60,176.35, leaving an overpayment of $823.65. Though this letter and statement were never mailed, they clearly indicated that it was not the intention of Morris Brothers, Inc., to deliver the bonds until after it had acquired the Port of Bay City bonds.

It was the intention to ship not a part of the bonds, but all of them. As stated by Mrs. Granning in her testimony:

> Q. Was it your purpose to secure the Bay City bonds and then ship them all at the same time?
>
> A. Ship them all at once. (See record p. 112.)

According to the letters the bonds were to be delivered at Lock Haven. According to the testimony the charges of transportation were to be paid by Mor-

ris Brothers, and the bonds were to be insured as the property of Morris Brothers, Inc., and for its benefit, and it was not intended that the bonds were to be delivered until Morris Brothers, Inc., had acquired all of them.

It is true as stated by Judge Lurton in McElwee vs Metropolitan Lumber Company:

> "Undoubtedly, the general rule is that if the seller obligates himself as a part of his contract to deliver the property to the buyer at some specified place, title will not pass until such delivery."

69 Fed. p. 305.

This general rule referred to by Judge Lurton is emphasized by Rule 5 of the Uniform Sales Act.

In the case of

Russell vs Nicoll, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670-672.

there was an agreement to sell 500 bales of cotton at 16½c per pound, the cotton to be delivered at New York by a certain date. Eleven bales of cotton were shipped and arrived in New York, and the purchaser demanded that they be weighed and offered to pay the purchase price therefor, but delivery was refused and the vendee brought an action in trover. The Court held:

> "Eleven bales of cotton did arrive within the specified time and defendant refused to deliver

because all 500 bales were not received. Their views of the contract in this particular appear to me to have been correct. The contract was for 500 bales. It was entire. There was no obligation on the part of the plaintiffs to receive a less quantity than the whole, and consequently none on the part of the defendants to deliver less than the whole. The obligation to deliver and to receive must be reciprocal. * * * Apply to this property the test mentioned in the case of McDonald vs Hewitt, this being 15 Johns, 349, 20 Am. Dec. 241. **Who would have been the sufferers if the cotton had been lost on its voyage from New Orleans to New York,** or while at the latter place before it had been weighed? Beyond all question the loss would have fallen upon the defendant."

Where the seller agrees to deliver the goods at the buyer's residence or at any other place, it is the seller's duty to deliver according to the contract. Until he has done that the property presumably is not intended to pass.

In the case of

Calcutta Co. vs De Mattos, 32 L. J. Q. B. 322, 335, Cockburn, C. J., said:

"If by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that the thing sold was to be in the meantime at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly, the property would re-

main in the seller and the thing would be at his risk."

In the case of

Fabrik vs Basel Chemical Works, A. C. 200-207

Lord Herschell, in speaking of goods ordered to be sent by mail from Switzerland to England, said:

> "If the goods were according to the order to be delivered by the seller in England, the sale would not have been constituted and complete in Switzerland. Until the goods had been delivered in London there would have been no sale. The property in the goods would not have passed to the purchaser."

The same rule is stated in

> 24 Am. and Eng. Ency. of Law (2d Ed.), page 1050,

as follows:

> "If by the terms of the contract the **seller is required to send, or forward, or deliver the goods to the buyer, the title and risk remains in the seller until the transportation is at an end** or the goods are delivered in accordance with the contract, after which time the title is vested in the buyer."

citing a number of cases

In the recent case of

> Neer vs Lang, 252 Fed. 575-577

the defendant wrote purchaser that he would sell him

20 shares of stock at $400, and the plaintiff wired: "We accept 20 Saxon at four hundred. Ship with draft attached." The defendant failed to comply and the plaintiff brought action for damages. The Court in dismissing the case said:

> "The law implies that the place of delivery of the stock shall be at the place of the seller, nothing appearing to the contrary, that is to say, in this case the place of delivery under said offer as made is Fort Leavenworth, Kansas (being defendant's place of business), but under the acceptance the delivery was to be made at Detroit, Michigan, where plaintiff resides."

The court held that the telegram of acceptance by adding the terms "ship with draft" introduced a new obligation not contained in the offer, obliging the seller to deliver at Detroit, and that the telegram therefore did not constitute a binding acceptance of the offer, and for this reason the defendant (the seller) was not liable.

In the case of

Burn vs Metropolitan Lbr. Co. 107 Atl. 609,

decided in 1919 by the Supreme Court of Connecticut, the plaintiff on May 7th, 1917, ordered from the defendant certain lumber and in the order used the statement, "Ship us transit car containing" etc. The order was accepted by the Lumber Company by subscribing its acceptance to the order. The defendant failed to deliver the lumber and the plaintiff brought suit for damages. The Court said:

> "The action being for damages for failure to deliver a quantity of lumber, the first question is, where was the lumber to be delivered. The court found it was to be delivered in Bridgeport and this conclusion of fact was warranted by the evidence. The contract was in writing, dated at Bridgeport. The question then is whether the words 'Ship us transit car' in connection with the place where the order was given, which was plaintiff's place of business, constituted a contract express or implied designating Bridgeport as the place of delivery. There was no evidence as to the meaning of the terms 'transit car' in the lumber business, and the court construed the words 'transit car' as meaning loaded and on the way to Bridgeport, and that, therefore, the only definite place possible to be ascertained from the contract was Bridgeport,"

and held that title did not pass until delivery of the lumber to the purchaser at Bridgeport.

In the case of

Mayo vs Price, 218 S. W. 932-3.

decided in 1920 by the Court of Appeals of Missouri, an interpretation is given of the word "delivered" in connection with a contract of sale. Plaintiff was a wholesale grocery firm at Caruthersville, Missouri, and defendant was a commission firm at St. Joseph, Missouri. The defendant offered to sell plaintiff two cars of potatoes, "with shipment as quick as can get cars, dollar twenty-seven delivered." Plaintiff answered, accepting the offer. Defendant failed to deliver and

plaintiff brought suit for damages. The Court, in ruling in favor of the plaintiff, held

> "We must overrule the contention that the contract does not require a delivery of the potatoes at Caruthersville. The plaintiff's place of business was Caruthersville, and when defendant by telegram from St. Joseph, Missouri, offered to sell plaintiff two cars of potatoes at the named price delivered, there could be but one fair meaning to the offer and that is delivery at Caruthersville."

In the case of

> Winkelmeyer Brewing Co. vs Nipp, 50 Pac. Rep. 956-958

decided by the Supreme Court of Kansas in 1897. Winkelmeyer contracted to sell to Saunders certain liquors, payment for the same being guaranteed by Nipp, and in pursuance thereof Winkelmeyer sold and shipped to Saunders at Wichita, Kan., six cars of beer which were not paid for, and the plaintiff brought suit alleging that the contract and sale was made in St. Louis and not in Kansas. According to the contract the freight was to be paid by Winkelmeyer. The Court in deciding this case held:

> "The contract of sale is therefore complete when Saunders mails a letter or sends a telegram ordering a car load of liquors. The contract of sale is complete, but the sale is not. Something more remains to be done. The liquors must be **separated and delivered to Saunders before the sale is completed.** It is clear that the separation

took place in St. Louis. The delivery is ordinarily made to the purchaser by delivery to the carrier. Where the purchaser is to pay the freight, the carrier is his agent. The illegality of the sale of intoxicating liquors frequently depends upon the place where the sale is made. This is governed by the place where the sale is completed by delivery. Where the vendor is to, and does, pay the freight to the place of delivery, the place of delivery becomes the place of sale. 11 Am. & Eng. Enc. Law, 742. If by the terms of the contract the seller is required to send or forward the goods to the buyer, **the title and risk remain in the seller until the transportation is at an end, after which time the title is vested in the buyer.**" Citing cases. "The freight charges were to be paid b Saunders in the first instance, but were to be charged to the brewing company nd deducted from the contract price of the liquors. Under a contract and transactions quite similar, the Supreme Court of Iowa, in Brewing Co. vs DeFrance, 58 N. W. 1087, held that the sale was completed by the delivery of the liquors at their destination. Following these decisions, which we think are founded upon correct principles, we must hold that the sales under the contract in this case were made in Wichita, Kan. It is immaterial where the agreement to sell was made."

It is therefore respectfully submitted that Rule 1 of the Uniform Sales Act has no application because it refers to the sale of specific goods in a deliverable state only, and that Rule 5 of the Uniform Sales Act

governs in this case for the reason that according to the weight of the testimony and according to the express agreement as contained in the letters the seller was obligated to deliver the bonds to the buyer at Lock Haven, Pa.

The Referee found as a matter of fact that the seller was obligated to make delivery of the bonds at Lock Haven and this finding was confirmed by the District Court.

However, it is contended that even if the agreement had contained no provision as to the delivery that if it had been the understanding that the bonds were to be taken up at Morris Brothers, Inc., in Portland, the title did not pass. In that event the transaction would be governed by Rule 4 of the Uniform Sales Act. In that event it would have been an agreement "to sell future goods by description" and nothing more. Rule 4 provides "where there is a contract to sell * * * future goods by description and goods of that description and in a deliverable state are **unconditionally** appropriated to the contract, either by the seller **with the assent of the buyer, or by the buyer upon the assent of the seller,** the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made."

The assembling of various bonds by Morris Brothers, Inc., was not done with the assent of the buyers; no such assent was given and under the circumstances none can be implied.

The buyer in the instant case was not notified that

the appropriation was made, had no knowledge that part of the bonds had been set aside, and therefore there could have been no express assent of the buyer to the alleged appropriation.

Was there an implied assent?

Counsel for appellant contends that such an implied assent can be inferred from the circumstances and particularly from the fact of payment. If prior to the time of the purchase price Morris Brothers, Inc., had notified the buyer that it had a part of the bonds on hand and had them set aside and pursuant to this notice payment had been made, there would be ground for argument that an implied assent had been given, but the record does not disclose any such fact. According to the evidence payment was in fact made to apply on the purchase of the bonds, was not made because the bonds had been set aside and was not therefore made with the intention that title to the part of the bonds that had been set aside should vest in the buyer.

There is an English case decided by Chief Justice Earle, in many respects similar to the present cause. That case involved a contract for the sale of 250 bales of cotton of a cargo of 500 bales of one mark. Of the 500 bales contained in the cargo 250 were marked from 1 to 250 and a warrant was handed to the purchaser for 250 bales of cotton numbered from 1 to 250. Thereafter the seller inadvertently delivered 200 of the 250 bales to other persons, and they offered the plaintiff a warrant for other numbers. Plaintiff refused to ac-

cept the warrant and brought an action to recover the value of the 250 bales of cotton. At the trial the plaintiff insisted that the bales of cotton were so earmarked and appropriated to him by the act of the company as to vest the property in him. The defendant, however, submitted that the mere act of appropriation by the company of 250 out of a large number was not sufficient to vest the property in the specific bales in plaintiff without an assent to such appropriation on his part. The trial judge instructed the jury according to this contention of the defendant. A motion for a new trial was made on account of error in so instructing the jury. This motion was denied and upon appeal the decision of the trial court was affirmed. Earle, C. J., in his opinion stated in part as follows:

> "This was an action for the alleged conversion by the defendants of 250 bales of cotton out of a cargo consisting of 500 bales, and the question is whether or not the property in these 250 bales ever vested in the plaintiff. For the affirmative of that proposition the plaintiff relies upon a delivery order from vendors, and the fact that the defendants by their warrant or certificate of warehousing had specifically appropriated to the plaintiff the bales numbered from 1 to 250. * * * Then it is said that the learned judge misdirected the jury in telling them that the mere act of appropriation by the company would not vest the property in the plaintiff unless he had assented to that appropriation, * * * I venture to say that the law as laid down by the learned judge was well laid down. It has been established by a long series of

decisions, of which it will be enough to refer to Hansen vs Meyer, 6 East 614, Rugg vs Minett, 11 East, 210, and Rhodes vs Thwaites, 6 B. & C. 688, that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and appropriation assented to by vendor and vendee. **Nothing passes until there is an assent, express or implied, on the part of the vendee.** The warehouseman may in some cases be the agent of the vendee for the purpose of such assent, but nothing passes until there has been a separation and an appropriation assented to."

Campbell vs Mersey Docks, 14 C. B. N. S. 412, 8 L. T. N. S. 245.

It is true that the decision of the learned jurist has been criticised by some authors on the ground that after the particular bales had been ear-marked and identified the purchaser was notified that they had been so marked and identified, and after being so notified made payment for the same, and that payment having been made by the purchaser after having been notified that the property had been set aside to him, the act of payment was an implied assent to the appropriation. While it is true that the fact that payment of the purchase price was made pursuant to notice that the goods had been segregated, identified and appropriated to the buyer, is a circumstance which would almost compel the inference that the appropriation was made with the assent of the buyer, in his decision Chief Justice Erle sustained an instruction given by the trial court to the jury that it was a ques-

tion of fact for them to find whether an implied assent had been given, notwithstanding that the particular bales of cotton were earmarked, identified and set aside and the purchaser was notified of this and thereafter made payment for the bales. The jury found no implied assent had been given and the trial court was sustained. In the instant case the purchaser was not notified of the segregation of the bonds, or that any of them had been appropriated to the contract. Payment was not made by the purchaser pursuant to any notice that the bonds had been assembled for delivery. Payment was not made upon any statement received by the buyer. In the letter accompanying the check for $61,000, Mr. Hopkins stated:

> "Enclosed you will find my check as trustee of the Estate of A. C. Hopkins for $61,000.00, to apply on the purchase of municipal bonds made from you on December 9th. Upon receipt of this check, please send me an exact statement of our account and if there is any considerable balance due you I will send you another check. If there is no considerable balance, I will ask you to send the securities on to Mr. Shaffer at Lock Haven and let him remit any small balance direct."

Can it be inferred that this letter was an express or implied assent to a segregation of the bonds, or to a passing of title? The Referee found as a matter of fact that the bonds were not set aside with the assent either express or implied of the buyer and it is submitted that no assent was given and none can be inferred from the evidence in this cause.

As a matter of law, segregation or appropriation

has no bearing in a case where delivery is to be made to the purchaser at any other place than at the buyers place of business.

In the case of

> First National Bank of Binghampton vs Peck, et al., 61 N. Y., App. Div. 258- 262,

the Court says:

> "The setting apart and marking such piles might operate as a sufficient appropriation and delivery of the same if it were done under a contract of sale that permitted a delivery on the yard and required nothing more to be done than that the lumber sold should be identified. * * * The only contract existing between them, that of June 18th, required a very different delivery and never having abandoned on modified the so-called delivery by marking the piles was entirely inoperative to pass the title."

The case of Barrs & Co., vs Mitchell, 154 Fed. 322, involved the sale of specific property to be delivered at the vendors' place of business. The lumber was specifically designated, described and segregated, and thereafter bills of sale with full description were presented and **accepted** and payment was thereupon made for the lumber which had been so segregatel. In that case therefore there was clear assent of the buyer to the appropriation. It was a complete delivery of the lumber which had been segregated to the buyer and an acceptance by him of the same.

The case of McElwee vs Metropolitan Lumber Co., 69 Fed. 302-305, also cited by counsel for the appellant, involved a contract for the sale of all the lumber which was to be manufactured by the defendant during a certain period. After the product of the mills for a particular month was completed, it was not only inspected by the buyer, but was measured and accepted by the buyer. In its opinion the court says:

> "To say that title remained with the vendor after the lumber had been appropriated to the contract and accepted by the buyer and thereafter paid for by the buyer, would leave the vendor liable for loss by fire and the vendee without security for the payment he had made."

In that case under the circumstances there was no question but that the buyer not only assented to the segregation but thereafter inspected and accepted the lumber.

In the case of

Hatch vs Standrd Oil Co., 100 U. S. 124-136 (involving the sale of staves), the court says:

> "Taken as a whole the evidence shows that the parties treated both piles of staves as delivered under the contract and that they regarded both as properly included in the adjustments of the amounts to be advanced. When the agent of the plaintiffs went there as before explained with one of the sellers it is certain that they counted both piles and it is clear that in view of the evidence and the circumstances the jury was warranted

> in finding that the property in the white oak staves piled there passed to the plaintiff when they were billed and delivered at that place. * * * Actual delivery of the staves having **been proved** it is not necessary to make any reply to the defense set up under the state statute in respect to the sale of goods unaccompanied by a change of position."

Therefore in the Hatch case the facts showed that the contract involved the sale of specific goods, which had been inspected and accepted by the buyer and which the jury found had been actually delivered.

The case of Harris vs Egger, 226 Fed. 389, was one involving the sale of shares of stock. The court held that the certificates were merely evidence of the corporate interests of shares sold and therefore the nondlivery of the certificates could not disturb the executed character of the transaction. The facts in this case are entirely dissimilar to the facts in the case at bar.

In Terry vs Wheeler, 25 N. Y. 520-524, was a case involving the sale of lumber. The court said:

> "The lumber was selected by **both parties** and designated as the lumber sold. The price for the whole was greed upon and paid and the bill of parcels receipted and delivered to the purchaser."

and held that these facts showed that the title vested in the purchaser. No question here of appropriation made without the consent of a buyer. The reason being that the buyer was present and inspected the lumber himself.

The cases cited by the counsel for appellant involve not only the sale of specific property but show that in each instance there was an appropriation made with the assent of the buyer.

All the circumstances surrounding this transaction show that both parties understood and construed the agreement as requiring delivery to be made to the buyer at Lock Haven, Pa. The agent of Morris Brothers, Inc., so understood the agreement. It was their intention to ship the bonds to Lock Haven insured in the name of Morris Brothers, Inc., at the expense of Morris Brothers, Inc. No notice was given by Morris Brothers, Inc., to the buyer that the bonds were being assembled in order to make delivery. Payment was not made because the bonds had been segregated. The payment covered not only that part of the bonds which were assembled, but also the $10,000 Port of Bay City bonds which were never acquired by the bankrupt. When Mr. Hopkins mailed the check for $61,000 in payment of the bonds nothing was said about a segregation. He only directed that the bonds be shipped to Lock Haven. No instructions were given as to the manner of shipment, as to the insurance of the bonds, or their safe transportation. All of these matters were left with the vendor because it was assumed that the bonds were being delivered at the risk of the vendor. We therefore submit that the Referee and the District Court were right in finding and holding that it was not the intention of the parties to this agreement that the title to the bonds should vest before they were actually delivered.

In Bankruptcy proceedings the right to reclaim goods should only be granted in those cases where the right clearly exists and the burden of proof is with the creditors to show their right by a clear preponderance of the evidence.

Matter of Murphy Shoe Co., 11 American B. R. 428;

Shook vs Levy, 39 American Bankruptcy Rep. 549, 240 Fed. 121.

It is respectfully submitted that the decision of the District Court in this cause should be sustained.

J. P. WINTER,
Attorney for the Trustee.